Nudging and human dignity

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Choice Architecture in Democracies Nudging and human dignity Christopher McCrudden Di 6 Jan 2015 Di 6 Jan 2015

Defining ‘nudging’

We need to begin with a working definition of ‘nudging’. For the purposes of this discussion, I suggest, mostly following Luc Bovens, that an intervention constitutes a ‘nudge’ if it meets certain criteria: first, that it must not restrict choice – no options must be forbidden; second, that it must be in the interests of the person being nudged; third, that it involves a change in the architecture or environment in which the choice of the person being nudged

is made; and, fourth, that it engages with the psychological insight that individuals may not, on occasion, act as wholly rational beings and therefore that public policy should take into account that individual decisions are made that result from 'less than fully deliberative choice.'[1] We can add to this a fifth criterion: that the intervention does not significantly change the economic or other incentives of the person being nudged.

Introducing human dignity into the nudging debate

Debates about the ethics of nudging defined in this way seem paradoxical. Both supporters and opponents invoke the concept of 'human dignity' in support of their respective positions.[2] Given that the concept of human dignity is a foundation of international and European human rights, as well as for many systems of national constitutional rights, and that human dignity is extensively resorted to in contemporary political discourse, disagreement over nudging's conformity with human dignity is critical.[3] In this brief discussion, my principal focus is on Cass Sunstein's *Why Nudge?: The Politics of Libertarian Paternalism*.[4] This presents a proposal for nudging as an *alternative* to traditional regulatory mandates and economic incentive-based regulation. I shall suggest that nudging creates considerable tensions with thick conceptions of human dignity.

Sunstein's human dignity

Sunstein adopts a somewhat confusing position regarding the relationship between human dignity and nudging. His baseline position is that nudging is *not incompatible* with human dignity,[5] but he also goes further seeing nudging as *supporting* the idea of human dignity.[6] His understanding of human dignity is also complex, not to say confusing. He adopts, at various points, at least three different substantive concepts of human dignity. The first understands human dignity essentially as involving respecting human agency and furthering autonomous decision-making (dignity-as-autonomy).[7] The second understands human dignity as requiring respect for others in the sense that others should not be treated in such as way as to insult or demean them (dignity-as-non-humiliation).[8] The third understands human dignity as treating persons as ends rather than simply as means (object formula).[9] Each of these formulations, of course, has advocates who distinguish their favoured approach as fundamentally different from the other.[10] For Sunstein, however, they are all adopted, at the same time, without any apparent recognition that they constitute different (and potentially conflicting) understandings of human dignity.

The reason for this apparent conceptual slackness subsequently becomes apparent, because ultimately he regards human dignity (in whatever of these guises it is presented) as merely a 'rhetorical flourish,'[11] a way of appealing to emotion. [12] Whatever rational substance it has amounts simply to advocating human welfare,[13] and thus presumably is subject to trade offs with other aspects of welfare.[14] For Sunstein, *die Würde des Menschen ist antastbar.* Reducing dignity to welfare is an important move in Sunstein's advocacy of nudging. In reducing human dignity to human welfare, he is back to the sphere of cost-benefit analysis with which he ultimately appears a lot more comfortable;[15] but achieving this leaves in its wake an impoverished understanding of human dignity.[16]

Cultivating inauthentic virtues

In the context of nudging, it completely misses why someone would want to be able to *choose* to do good (e.g. give blood, or donate organs after death) *for the right reasons as understood by that individual and others,* rather than be nudged into choosing to do it for the government's reasons.[17] The British Government's Organ Donation Taskforce, which considered the potential impact of an opt-out system for organ donation in the UK, in recommending against such a system, drew attention to the 'powerful evidence' it had received from recipients of organs 'who stressed their need to know that organs had been freely given by donors and their families, and from donor families who often find great comfort in being an active part of the decision to donate.'[18] It entails, in other words, 'the cultivation of inauthentic virtues,' in Karen Yeung's pithy phrase.[19]

Harnessing cognitive irrationalities

There are two basis forms of nudging, and my concerns so far relate to particularly to one of these forms. I suggested earlier that nudging engages with the psychological insight that individuals may not, on occasion, act as wholly rational beings and therefore that public policy should take into account the fact that individual decisions are sometimes made that result from 'less than fully deliberative choice.' But this engagement may take either of two radically different paths. Nudging that encourages more discussion, more debate, more rational discourse, and more participation in the political system does not, I think, raise the specific dignity concerns I raised in the previous paragraph. On the other hand, some forms of nudging *rely* on psychological insights to try to ensure 'good' results in ways that depend on less than full transparency. They 'attempt to harness cognitive irrationalities in aid of desired social policy outcomes.'[20]

Political economy of nudging

We should note three further aspects of Sunstein's approach before considering the implications of thicker conceptions of human dignity for both forms of nudging more generally. Despite its subtitle ('The *Politics* of Libertarian Paternalism'), there is practically no discussion of the current political economy of nudging. Yet, it is no coincidence that the four governments that have shown most interest in nudging are all Conservative center-right governments (the Obama administration in the United States,[21] David Cameron's Coalition government in Britain,[22] Angela Merkel's government in Germany,[23] and the current government of New South Wales in Australia[24]). The reason to note this is because it situates the current practice of nudging centrally within economic liberalism and deregulation.[25]

Whether this is Sunstein's own political agenda is unclear, but I suspect it is. He argues consistently, for example, that nudging, rather than traditional regulation, should be the default approach, and that traditional regulation can only be justified if supported by much stronger evidence than that presented in favour of nudging itself. His is not just a collection of good ideas without a theory, it seems, but a general theory of regulation. But in Sunstein's case, as well as in the case of each of the four governments with whom nudging is most popular, it is an economic liberalism that still wants to achieve some betterment of

the human condition, provided it is without significant political or economic costs. We should expect, therefore, that methods of nudging are more likely to be adopted that aim to achieve results manipulatively rather than transparently, and that they will be under the radar politically, in spite of Sunstein's rather optimistic view that nudging is consistent with openness.[26] This is because, as we have seen, at least some of the types of nudges advocated depend on the use of choice architecture that 'is intended to work deliberately … to by-pass the individual's rational decision-making processes in order to channel behavior in the direction preferred by choice architect.'[27] It takes advantage 'of the human tendency to act unreflectively.'[28]

Citizens as consumers

Indeed, there is a tone of barely disguised skepticism of, and frustration with, democratic decision-making in the book.[29] This is particularly noteworthy in the way in which those benefitting from regulation are described. Rather than being 'citizens', a description that emphasizes their political status and their active participation in choosing and controlling those they elect, they are primarily regarded as 'consumers,'[30] emphasizing their role as market actors (and somewhat passive ones at that).[31] Thus, one of the principal arguments in support of a non-paternalistic justification for regulation, that we *as citizens* impose constraints on *ourselves* through electing officials who will regulate in our collective interests, is simply set to one side.[32] It would also be unsurprising if an approach to nudging were taken that emphasized technocratic, as opposed to democratic, legitimacy, given that the latter is so much more open than the former to the 'emotions' of which Sunstein is so suspicious.[33]

Framing the issue as paternalism

A second aspect of Sunstein's book is also more understandable if we understand the specifically American political economy of nudging. This is the extent to which, in his quest to defend nudging against accusations of strong paternalism, he cedes significant ground to the libertarian right wing, particularly its American variant.[34] It is this group, often associated with and funded by corporate business interests, which essentially frames the issues that Sunstein discusses, with somewhat bizarre results, at least to my European eyes. Thus, Sunstein sees much traditional regulation as problematic because it is analyzed as strongly paternalistic, particularly in limiting the freedom of choice of *consumers* for their own good.

Where did all the producers go?

There are at least two significant problems with this way of framing the issues. First, traditional regulation is usually based, rather, on preventing harms resulting from *producers*. Regulation that is targeted by government at commercial organizations can hardly be regarded as raising any concerns about paternalism.[35] In Sunstein's view of the world, however, producers sometimes simply drop out of the picture, and with them the harm that they can cause, leaving only the ostensibly paternalistic relationship between government and consumer to be worried over.[36] In prominent examples, Sunstein largely

sets to one side the *triangular* relationship of government, producer and consumer. [37] For example, rather than seeing banning the sale of fructose-saturated, obesity-inducing soda[38] in huge sixteen-ounce containers as restricting the harms caused by soda *manufacturers*, the issue is reframed as one of government paternalism towards soda *consumers*.[39] In none of the list of fourteen regulatory possibilities he considers in getting people to stop smoking, is there any mention of the option that the *manufacture* of cigarettes might simply be banned because of the harm they cause. By allowing producers to escape scrutiny, Government is let off the hook of having to satisfy what is surely one of its principal tasks in securing human dignity: to provide the conditions for individuals to be able to exercise free choices, by regulating harms caused by powerful interests.

Self-regarding and other-regarding decisions

The second problem, as several commentators have pointed out in relation to Sunstein's earlier book with Richard Thaler,[40] is that much regulation is not primarily concerned with affecting individuals actions for their own good, sometimes called '*self-regarding*' decisions, but rather for the good of others, sometimes called '*other-regarding*' decisions.[41] When guns are regulated or prohibited, this is primarily to protect *others* rather than the individual who seeks to own weapons. When cigarettes are taxed in order to reduce smoking, this is often to reduce the costs to national health services, rather than for the benefit of the individual smoker. To view these types of regulation through the lens of paternalism, as if they were aiming to target 'self-regarding' decisions by individuals, just seems misguided, as well as to have implicitly accepted the libertarian right-wing framing of these issues.

Regulation for disillusioned American progressives

This is not to say that Sunstein doesn't understand these points; of course, he does. My fear is that the progressive in Sunstein has become so disillusioned by the inability of progressive liberals to retain, let alone advance, basic aspects of American progressive politics that he sees nudging as simply the best way of achieving aspects of this agenda, given the current rather bleak circumstances. *Why Nudge?* reads to me, in other words, as an admission of defeat, an analysis driven by despair: the only way of furthering a progressive liberal agenda in the current context of American politics is through manipulation and under-the-radar activity, because progressive politics stands no chance of success if it above-board. And, in the American context, that analysis may well, unfortunately, be correct. But if that is what is driving Sunstein, it would be much more honest to come out and say this directly, rather than to dress it up in language that implies that it is not situated in a particularly American political moment.

Those of us with a less bleak view of the possibilities of democratic politics in our own countries should be anxious to resist the import of such a method of regulation so imbued with particularistic American values and context. That may, of course, be optimistic. Perhaps we in Europe are now in a situation where, as a result of economic globalization, we must accept that we too are unable to regulate multi-nationals and other powerful

interests, and that we are reduced to having to view the world through disillusioned American liberal eyes. But we should not simply assume this, and we certainly should not structure our entire regulatory system around this assumption.

Ignoring the evidence

The third worrying aspect of the book relates to the use of empirical evidence. Sunstein is apparently committed to evidence-based policy-making. At several points in the book, he stresses the need to test criticisms of nudging against empirical results of nudging in practice.[42] Sunstein's book, however, is remarkable *un*empirical, not just because he doesn't appear to do empirical work himself but more importantly because he underreports available evidence against nudging. Why is this so? Essentially, my reading of his book is that he is attempting to present a *theoretical* defence of nudging, rebutting claims that nudging is paternalistic. He stresses that, in practice, judging whether nudging is a good thing in any particular situation depends on context and evidence; in some cases, it may be inappropriate, but that should not lead us to any conclusion about its theoretical justification. I disagree. A practice-dependent analysis of nudging is not only appropriate; it is also necessary.

Effects of nudging-as-regulatory-theory in Britain

What, then, does the evidence base tell us about nudging? A detailed investigation was carried out by the Science and Technology Select Committee of the upper House of the United Kingdom Parliament (the House of Lords) in 2010 and 2011.[43] This Report makes sobering reading for those contemplating introducing nudging as a central element in government regulation. Given the features of Sunstein's work noted above, it is not surprising that evidence from this Report in the United Kingdom indicates that, *as practiced*, nudging undermines a thicker conception of human dignity in at least two ways: first, by diverting government from its responsibility to use other, more effective, instruments that would secure the just redistribution of resources essential to us being able to exercise our human agency;[44] and, second, by reducing opportunities for public deliberation and democratic discourse in favour of non-transparent, technocratic manipulation.[45] And we have already seen that other evidence from the UK supports a conclusion that certain types of nudging strategies in practice restrict the opportunities for citizens to act as moral agents, which involves us in doing the right thing for what we consider the right reason.[46]

Unjustified optimism

These criticisms should not be seen as an attack on behavioural economics. Its benefits as a tool of analysis are clear in at least one respect. Sunstein points to the insight that proponents of policies are apt to be wildly optimistic about the benefits of policies they support, and significantly downplay the likely problems.[47] This insight is all too evident in Sunstein's own work on nudging. The absence of any reference to the British empirical

evidence against nudging betrays is noteworthy.[48] As Jeremy Waldron wrote in his sober *New York Review of Books* review of *Why Nudge*?: 'More reassuring, I think, would be a candid assessment of what might go wrong with nudging.'[49]

Human dignity revisited

But there is a deeper problem, as Waldron also suggests. Critics of nudging are right to challenge Sunstein's thin and reductionist understanding of human dignity.[50] If it is to be used, we should espouse a thicker understanding, adopting a more complex conception of the person and of the role of government in furthering the common good. In those jurisdictions that incorporate this thicker conception of human dignity, nudging may also encounter legal difficulties.[51] Constitutional and human rights legalities aside, however, those seeking to pursue progressive politics should reject nudging in favour of regulation that is more transparent, more effective, more democratic, and allows us more fully to act as moral agents.

I am grateful to Bruce Ackerman, Christoph Möllers, Susan Rose-Ackerman, and Caroline Pannell for several conversations on these issues.

[1] Cited in House of Lords, Science and Technology Select Committee, 2 nd Report of Session 2010-12, Behaviour Change, Report, HL Paper 175, July 2011 (hereafter, Science and Technology Select Committee Report), Appendix 6: Ethics and Behaviour Change Seminar Held at the House of Lords, 10 February 2011, 105 at 106.

[2] Cass Sunstein, a prominent supporter, argues that nudges 'are meant to promote autonomy and dignity,' Letter to the *New York Review of Books*, 23 October 2014. Jeremy Waldron, a critic, argues that nudging compromises human dignity because it is manipulative, Jeremy Waldron, *New York Review of Books*, 9 October 2014.

[3] Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, (2008) 19(4) *European Journal of International Law* 655.

[4] Yale University Press, 2014 (hereafter ' *Why Nudge*?).

[5] *Why Nudge*?, 161.

[6] See reference at note 1, above.

[7] He writes in the NYRB, note 2 above, that 'the whole idea of nudging is designed to preserve freedom of choice, and in that sense both autonomy and dignity.' See also *Why Nudge?,* 127.

[8] *Why Nudge?,* 133.

[9] *Why Nudge?,* 127.

[10] See Christopher McCrudden, In Pursuit of Human Dignity, in Christopher McCrudden (ed), *Understanding Human Dignity* (OUP, for British Academy, 2013).

[11] *Why Nudge*?, 128

[12] *Why Nudge?,* 128, describing the 'thick' conception of autonomy as deriving from 'System 1' thinking, which he earlier describes as 'emotional and intuitive,' *Why Nudge*?, 26.

[13] *Why Nudge*?, 134.

[14] Support for this comes not only from the book, Why Nudge?, but also from Executive Order 13563, the Obama Administration's attempt to instantiate cost-benefit analysis into Federal Government regulation. Section 1 requires balancing of benefits, costs, and burdens, specifying that agencies may consider and discuss certain values that 'are difficult or impossible to quantify', and that such values include 'equity, *human dignity*, fairness, and distributive impacts' (emphasis added). Sunstein was Administrator in the Office of Information and Regulatory Affairs, in the Office of Management and Budget between 2009 and 2012.

[15] Cass Sunstein, The Cost-Benefit State, Chicago Working Paper in Law and Economics (American Bar Association, 2002)

[16] Incidentally, perhaps if Sunstein's approach to dignity had not been adopted in the early days of the interrogation of terrorist suspects, we might not have seen the scandal of CIA torture.

[17] Roger Brownsword, Human Dignity, Human Rights, and Simply Trying to Do the Right Thing, in Christopher McCrudden, *Understanding Human Dignity*, 345. See also Roger Brownsword, Lost in Translation: Legality, Regulatory Margins, and Technological Management, (2011) 26(3) *Berkeley Technology Law Journal* 1321, at 1348-9.

[18] Organ Donation Taskforce, The Potential Impact of an Opt Out System for Organ Donation in the UK (London, 2008), para 1.10.

[19] Karen Yeung, Nudge as Fudge, (2012) 75(1) *Modern Law Review* 122, 146.

[20] Yeung, above, note 20, at 137.

[21] Sunstein was Administrator in the Office of Information and Regulatory Affairs, in the Office of Management and Budget between 2009 and 2012.

[22] A Behavioural Insights Team was established within the Cabinet Office in 2010.

[23] *Frankfurter Allgemeine*, January 4 2015

[24] The Government of New South Wales has established a 'Behavioral Insights Community of Practice,' see http://bi.dpc.nsw.gov.au/

[25] The Director of the UK Behaviour Insights Team has been quoted as saying that it was the impact of the financial crash and the incoming Conservative-led Government in 2010 that led to the introduction of nudging in UK government: 'Their instincts were generally, 'we've got no money and we're going to constrain the size of the state and deregulate'. So now you are using these approaches as a softer alternative to regulation.' *Independent*, 9 February 2014.

[26] *Why Nudge*?, 147. We should note, however, the highly qualified nature of Sunstein's

support of openness. The visibility of government decisions is only 'in general, an important and desirable safeguard,' at 145. Practices that embody soft paternalism 'should be subject to public scrutiny in advance', but only '[t]o the extent feasible,' at 148. He considers it is 'hard to see why' nudges that operate 'subconsciously' and 'do not promote deliberation' should be seen as 'objectionable, as a matter of principle,' at 150-151.

[27] Yeung, above note 20, 136

[28] Yeung, above note 20, 136.

[29] See, e.g. *Why Nudge*?, at 144: 'One person's political safeguard will be another person's interest-group power.' Or *Why Nudge*?, at 121 where the idea that 'in at least some cases, [elected officials'] own intuitive reactions, and those of their constituents, drive judgments about policy and even legislation', appears as a problem to be overcome, an aspect of an 'imperfect' system.

[30] In *Why Nudge*?, there are 33 references to 'consumers' and 2 to 'citizens.'

[31] See Suzanne Mettler, *The Submerged State: How Invisible Government Policies Undermine American Democracy* (2011, University of Chicago Press, Chicago). In contrast with Sunstein's own earlier work in which a much more Republican conception of the individual in a polity was in evidence, see, e.g. Cass Sunstein, *Republic.com*, Princeton N.J.: Princeton University Press, 2001.

[32] *Why Nudge*? at 112, and 179, note 23. Even this is characterized by Sunstein as 'autopaternalism.'

[33] See fn 11 above.

[34] It would be interesting to explore further whether there is a connection between political support for nudging by the Obama Administration, and the decision of the United States Supreme Court in *Citizens United v Federal Election Commission*, 558 U.S. 310 (2010) which effectively confirmed the trend of campaign spending decisions by the Court over the past decades to allow corporate interests to dominate American democratic politics.

[35] Following the approach taken by the House of Lords Committee, see note 1, above, at para 15: 'different considerations should apply to interventions which affect individuals directly than those which affect commercial organisations directly.'

[36] In a key move, *Why Nudge*?, at 81, Sunstein considers that regulating in those context in which 'paternalism' towards consumers is considered to be operating 'might turn out to involve harm to others', but he does not consider that it is the manufacturers or producers that may be causing the harm, and in any event he simply puts such arguments 'entirely to one side,' in order 'to keep the focus on paternalism.'

[37] *Why Nudge*?, at 82-84.

[38] See, e.g. Costas A Lyssiotis and Lewis C Cantley, F Stands for Fructose and Fat, (2013) 502 *Nature* 181, 10 October 2013. I am grateful to Caroline Pannell for this reference.

[39] *Why Nudge*?, 54.

[40] Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (Penguin Books, 2008)

[41] Yeung, note 20 above, at 124.

[42] E.g. *Why Nudge*?, at 114: 'the best approach is to examine concrete proposals;' at 165: '[e]verything depends on the context.'

[43] Science and Technology Select Committee Report, note 1 above.

[44] Here is the Select Committee's conclusion on this point, based on the evidence it received ('non-regulatory measures' refers to what Sunstein refer to as 'nudges'):

"5.13 In general, the evidence supports the conclusion that non-regulatory or regulatory measures used in isolation are often not likely to be effective and that usually the most effective means of changing behaviour at a population level is to use a range of policy tools, both regulatory and non-regulatory. Given that many factors may influence behaviour, this conclusion is perhaps unsurprising.

5.14. We welcome efforts by the Government to raise awareness within departments of the importance of understanding behaviour, and the potential this has for the development of more effective and efficient policies. We are concerned, however, that emphasising non-regulatory interventions will lead to policy decisions where the evidence for the effectiveness of other interventions in changing behaviour has not been considered. This would jeopardise the development of evidence-based, effective and cost-effective policies.

5.15. We therefore urge ministers to ensure that policy makers are made aware of the evidence that non-regulatory measures are often not likely to be effective if used in isolation and that evidence regarding the whole range of policy interventions should be considered before they commit to using non-regulatory measures alone."

See also the Evidence provided to the Committee by Professor Susan Mitchie, et al., paras 17, 25.

[45] The Committee considered, para 2.13, that the measures in question 'involve altering behaviour through mechanisms of which people are not obviously aware. This raises an interesting question about the extent to which nudging is compatible with the Government's commitment to "extend transparency to every area of public life".'

[46] Organ Donation Taskforce, The Potential Impact of an Opt Out System for Organ Donation in the UK (London, 2008), see above text at notes 19.

[47] *Why Nudge*?, 44-46.

[48] The work of the UK Behavioural Insights Team is discussed in *Why Nudge*?, at 12, but with no mention of the criticism to which it has been subjected.

[49] Waldron, *NYRB*, above note 2.

[50] Waldron, *NYRB*, above note 2.

[51] See, e.g. Organ Donation Taskforce, The Potential Impact of an Opt Out System for Organ Donation in the UK (London, 2008), para 6.1-6.2.

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